

5-35569

NO.05-35570

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL WILDLIFE FEDERATION, et al.
Plaintiff-Appellees,

AND

STATE OF OREGON,
Intervenor-Plaintiff-Appellee

v.

NATIONAL MARINE FISHERIES SERVICE, et al.
Defendant-Appellants,

AND

BPA CUSTOMER GROUP, et al.
Defendant/Intervenor-Appellants

FILED

JUL 01 2005

THY A. GATVERSON, CLERK
U.S. COURT OF APPEALS

**ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

AMICUS BRIEF OF WASHINGTON STATE

Amicus Curiae supporting the Appellants in part, and the Appellees in part

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I. INTRODUCTION

The State of Washington respectfully submits its *amicus* brief urging this court to reverse the district court's order granting injunctive relief. To support this position, and to avoid redundant briefing, Washington relies upon portions of the brief submitted by the BPA Customer Group. Washington joins the BPA Customer Group to the extent that they call into question the risks and benefits of the relief ordered by the court in comparison to the proposed federal action – continued implementation of a summer hydro strategy designed to address low flow river operations. Washington's brief also clarifies its position regarding the utility of spill in light of the Appellees' frequent references to Washington's endorsement of that method of fish passage.

Because the various Appellants have chosen to advance an additional argument on appeal of the ordered relief - challenging the district court's underlying conclusions regarding the validity of the 2004 Biological Opinion (BiOp) for the Federal Columbia River Power System (FCRPS) - Washington also submits this *amicus* brief to provide its perspective on the consequences associated with any ruling from this court on the validity of the 2004 BiOp. Washington continues to support the position of the Tribes and others in arguing that the district court properly determined that the 2004 BiOp is invalid. No other party shares our unique position in this matter - opposing the 2004 BiOp while also questioning the district court's basis for ordering the injunctive relief it granted.

II. INTEREST OF *AMICUS CURIAE* WASHINGTON STATE

Washington has several vital interests that are of significance with regard to the matter before this court.

The listing of Columbia and Snake River salmon has had huge impacts on Washington's citizens. Collectively, state and federal interests have tapped the

bounty of the Columbia River Basin, utilizing river water for various beneficial uses such as irrigation, transportation, electric power, and harvesting fish native to its waters. But this utilization has taken its toll on salmon. The four areas of human impact generally recognized as having the most intimate connection to salmon protection and recovery - Habitat, Harvest, Hatcheries, and the Hydroelectric Power System - the "Four Hs" - must contribute to efforts that will ensure the continued existence of listed Columbia Basin salmon and that will ultimately reverse these listings. That requires responsible action by state, local and federal entities who reside in, and who make use of, this basin. Accordingly, Washington has set itself to the task of working with other state, local, federal and tribal interests to develop and implement strategies for the conservation of salmon, relying upon an equitable "All H" approach. The success of that approach depends upon effective implementation of the ESA.

NOAA's 2004 BiOp took an impermissibly narrow view of the action under consultation. It excluded certain aspects of future FCRPS operations from the consultation based upon a hypothetical distinction between those portions of future dam operations that are discretionary and those which are nondiscretionary. Nondiscretionary operations were excluded from the action being evaluated even though the action agencies have ample authority under the Northwest Power Act to bring compensatory mitigation to bear on the impacts from such activity. The BiOp also failed to properly evaluate the effects of this narrowed view of federal action in light of the baseline and cumulative effects that are the contextual reference for any proposed action, and failed to give a "hard look" at the manner in

which impacts to the listed fish, and their critical habitat, might affect prospects for recovery as well as survival.¹

Washington's interest in the development of a balanced salmon conservation program would be adversely affected by the 2004 BiOp's flawed approach. Section 7(a)(2) was designed to ensure that federal actions are fully evaluated with regard to their impacts on ESA listed species and are only undertaken where those actions would not jeopardize the ability of these species to "continue to exist into the future while retaining the potential for recovery."² A Section 7 consultation that artificially limits its focus to a subset of impacts from future FCRPS operations has the effect of artificially limiting the responsibility of the federal action agencies to deal with those impacts. That is inconsistent with the substantive goals established in Section 7(a)(2). Furthermore, it passes the burden of ensuring the persistence and recovery of listed salmon to other partners. Worse yet, it has the potential to condone a "business as usual" approach while the species is allowed to continue along a path to extinction.

Congress wisely adopted mandatory prescriptions in Section 7(a)(2) to ensure that federal actions which jeopardize the continued existence of a listed species, or that adversely modify critical habitat, will either be avoided or fully mitigated. In light of the difficult history of federal salmon conservation efforts, adherence to the requirements of Section 7(a)(2) is fundamental to the conservation of Columbia River Basin salmon. In the case of the FCRPS, this requires a consultation that fully considers and takes responsibility for addressing the impacts to salmon arising from future operations of the FCRPS.

¹ The district court's determination that the 2004 BiOp is invalid is found at *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 2005 WL 1278878 (D.Or. May 26, 2005).

² As stated in the *Endangered Species Consultation Handbook*, page 4-35), this is the fundamental purpose of the jeopardy analysis performed under a Section 7 consultation. (ER 1298)

In addition to the broad goals of the ESA, Congress specifically addressed the interplay between power generation and wildlife protection within the FCRPS with its enactment of the Northwest Power Act. Recognizing the need to accommodate both objectives, Congress provided the federal action agencies with a mandate, and with the authority, to conserve wildlife resources while generating power from the operation of FCRPS dams. The federal government's argument that it has no responsibility under Section 7 of the ESA to consider the impacts of certain dam operations because they arise from "nondiscretionary" federal activity authorized by other statutes ignores the ample discretionary authority to compensate for those impacts. Washington has a vital interest in ensuring that the purposes of the Northwest Power Act are not ignored in the federal government's efforts to limit its responsibilities under the ESA consultation process.

Washington's interest in the injunctive relief reflects its concern over the benefits from the FCRPS and the important role the FCRPS must undertake to ensure the conservation of salmon and other fish and wildlife resources. As explained by the Governors of Idaho, Montana, Oregon and Washington, "[t]he vitality of BPA and the health of our fish and wildlife in the Columbia Basin are mutually dependent." The four governors also recognized that "[t]he FCRPS provides us not only with a formidable economic engine for the region ... but also with the ability to meet our environmental and treaty obligations."³

Continued implementation of that BiOp during the remand, including many of its near-term hydro operation strategies, would maintain the economic engine that helps to drive salmon conservation efforts. Injunctive relief may be appropriate, but only where the injunctive relief is specifically tailored to address a

³ *Recommendations Of The Governors of Idaho, Montana, Oregon and Washington For Protecting and Restoring Columbia River Fish and Wildlife And Preserving the Benefits of the Columbia River Power System (June 2003).*

substantive violation of the ESA that flows from such activity. Given the uncertain nature of the science on spill in low flow years, Washington has never asserted that added spill in those circumstances will definitively produce better outcomes for fish than the pre-existing hydro strategies the federal government proposes to utilize.

III. ARGUMENT

A. **The federal district court properly determined that the 2004 BiOp was arbitrary and capricious.**

Washington State agrees with the arguments made by the Treaty Tribes of Washington State, and the Appellees in this case, in response to the Appellants' efforts to overturn the district court's injunctive relief by taking issue with the district court's prior determination that the 2004 BiOp is invalid. To minimize the briefing presented on appeal, Washington summarizes its points of agreement in the following sections and relies upon the briefings of the Tribes and Appellees insofar as they support Washington's stated position.

1. **NOAA's analysis improperly excluded future FCRPS operations from the scope of federal agency action under consultation.**

The substantive mandate of Section 7(a)(2) of the ESA⁴ requires federal agencies to "insure that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or any threatened species or result in the destruction or adverse modification of [the designated critical] habitat of such species..." *Id.*

To ensure that this substantive outcome is achieved in practice, Section 7 begins with a very broad definition of agency action – actions that authorize, fund

⁴ 16 U.S.C. §1536(a)(2).

or carry out programs – a definition that is all-inclusive and that “admits of no exception.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 (1978). Furthermore, it was Congress’ intent to “require agencies to afford first priority to the declared national policy of saving endangered species” and “to give endangered species priority over the ‘primary mission’ of federal agencies.” *Id.* at 185. Accordingly, Section 7 applies to *all federal actions* that authorize, fund or carry out the future operation of the FCRPS, *without exception*. These first principles must guide this court when analyzing the approach NOAA took when it crafted the 2004 BiOp to evaluate the effects of future FCRPS operations.

The effects of a proposed federal action are evaluated in the context of how they affect a listed species when added to baseline conditions together with the impacts of future non-federal actions that are reasonably certain to occur (cumulative effects).⁵ NOAA’s failed effort is rooted in the approach it utilized to separate impacts associated with the existence of the FCRPS dams (the baseline conditions) from impacts that arise with future operation of the FCRPS. NOAA’s 2004 BiOp employed a novel and unprecedented approach to address this issue. It utilized 50 C.F.R. § 402.03, and the concept of discretionary and nondiscretionary operations, as a basis for trying to distinguish between baseline impacts and impacts from future operations. However, as NOAA must admit, this approach ultimately places the impacts of some future operations – those which NOAA characterizes as nondiscretionary – within the baseline, together with the basic existence of the dams. Therefore, NOAA’s effort to separate the existence of the dams from future operations fails to achieve this objective.

In the process of trying to separate the effects of past construction and prior operations from the effects of future dam operations, NOAA impermissibly

⁵ 50 C.F.R. §402.02 (defining “effects of the action”)

narrowed its review of the federal action undergoing consultation. It removed a subset of future federal operations, and their effects, from the Section 7(a)(2) consultation. This approach goes too far. It undermines the substantive purpose of Section 7(a)(2) and essentially legislates an exemption to the ESA's definition of agency action despite the conclusion in *TVA v. Hill*, 437 U. S. 153, that this definition "admits of no exception." *Id.* at 173.

2. NOAA's analysis improperly limits the substantive obligation under Section 7(a)(2) and ignores agency discretion provided by the Northwest Power Act to mitigate for unavoidable impacts.

A narrow reading of 50 C.F.R. § 402.03 is required if it is to be applied in a manner that is consistent with the clear intention of Congress to define agency action very broadly. For example, in certain limited cases the regulation might recognize that it may be pointless to conduct a consultation - the *procedural duty* under Section 7(a)(2) - in those cases where a federal agency has absolutely no ability to address the effects of federal agency action. However, that is very different than concluding that an action agency has met its *substantive duty* under Section 7(a)(2) - ensuring that its actions will not jeopardize a listed species or adversely modify designated critical habitat.

Furthermore, the regulation must be applied narrowly so that it does not limit the scope of a consultation simply because some portions of the impacts from a future federal action are unavoidable. As this court recently pointed out in *Washington Toxics Coalition v. Env't Prot. Agency*, No. 04-35138 (9th Cir. June 29, 2005) the obligation to consult exists if there is some discretion to take action that will "inure to the benefit of a protected species" citing to *Turtle Island Restoration Network v. Nat'l. Marine Fisheries Serv.*, 340 F.3d 969, 974-77 (9th Cir. 2003). That analysis applies equally well in this case. Certain impacts

associated with the future operation of the FCRPS may be "unavoidable" in the sense that they arise from nondiscretionary agency action. However, the ability to avoid an impact is only one way of dealing with that impact. The action agencies have ample authority under the Northwest Power Act,⁶ and their other authorities, to bring compensatory mitigation to bear on the impacts from FCRPS operations.⁷

When the full breadth of agency discretion is considered, it is apparent that a meaningful consultation can be performed for the future operation of the FCRPS. Accordingly, any Section 7 consultation for the FCRPS operations must consider all reasonably foreseeable future impacts associated with its operations. Any other conclusion impermissibly dilutes the substantive outcome the ESA mandates under Section 7(a)(2).

3. NOAA's "Net Effects" analysis is inconsistent with the required Section 7 analysis.

Having improperly narrowed the FCRPS operations being reviewed, NOAA compounded its error by conducting its Section 7(a)(2) analysis without giving a hard look at the manner in which the survival gap created by the FCRPS operations would impact salmon in light of baseline conditions and cumulative effects. NOAA bypassed this step after concluding that the "net effect" of FCRPS operations, together with mitigation activity the action agencies incorporated into their proposed action, produced a near neutral set of impacts. However, NOAA's

⁶ 16 U.S.C. §839 et seq. *See especially*, § 839b(h)(11). In this sense, the Power Act treats power generation and wildlife objectives as "different but complementary purposes" of FCRPS operations. Accordingly the notion that mandatory FCRPS operations trumps any ability to evaluate those operations under the ESA must be rejected in the same manner the federal defendant's arguments to that effect were rejected in *Washington Toxics Coalition*.

⁷ Indeed, under the ESA, they have an obligation to do so. *See e.g.* Section 7(a)(1) of the ESA - 15 U.S.C. § 1536(a)(1).

regulations require a more searching inquiry that evaluates any net impact comprehensively in light of baseline conditions and cumulative impacts. *Kandra v. United States*, 145 F. Supp.2d 1192, 1208 (D. Or. 2001).

4. NOAA failed to properly evaluate the effect that future FCRPS operations might have on the recovery of listed salmon in addition to the impact those operations might have on the species' continued survival.

NOAA's 2004 BiOp retreated substantially from the consideration previously given to the prospects for recovering listed salmon populations. While Washington agrees that recovery planning is addressed in separate sections of the ESA,⁸ the notion that there is a substantive recovery consideration associated with a Section 7(a)(2) analysis should come as no surprise. The Consultation Handbook states that a species must be able to "both survive and recover" after a proposed action is undertaken.⁹ In *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) the court made it clear that recovery is a substantive factor in a Section 7 consultation.

While the *Gifford Pinchot* court was primarily focused on the application of recovery considerations to the critical habitat portion of the Section 7(a)(2) analysis, the court began its analysis with observations that apply to a Section 7 consultation generally. "[T]he ESA was enacted not merely to forestall the extinction of species (i.e. promote a species survival), but to allow a species to recover." *Id.* at 1069. The court concluded that the survival and recovery elements of a Section 7(a)(2) consultation are "distinct, though complementary goals." *Id.* at

⁸ Sections 4(f) and 7(a)(1).

⁹ *Endangered Species Consultation Handbook*, pg. 4-35. (ER 1298)

1070. The court did not, as NOAA asserts, conclude that recovery should only be considered within the province of Sections 4(f) or 7(a)(1).

NOAA should have acknowledged the substantive recovery considerations within Section 7(a)(2) and provided a reasoned analysis of how the effects of future FCRPS operations will impact efforts to recover salmon. Instead, NOAA argues that, for a species in decline, its jeopardy analysis merely considers whether the identified action will hasten the decline of the listed species. In other words, this jeopardy analysis accepts the possibility of a controlled glide path to extinction. That is inconsistent with the substantive mandate of Section 7.

B. While the federal district court properly concluded that the 2004 BiOp was invalid in the APA litigation, Washington does not concur that added spill is definitively better than the federal government's current summer operation strategy.

Washington agrees with the arguments in the BPA Customer Group's brief that oppose the court's injunction based on the position that there is an unclear connection between the ordered relief and any allegation that there is a substantive violation of the ESA.¹⁰ Washington submits this brief to clarify the position of Washington regarding the utility of spill.

1. The Appellees mischaracterize Washington's position on the utility of spill.

Appellees' previous briefs have commonly made reference to the position of Washington State fishery biologists suggesting that they advocate for increased spill in every circumstance. While Washington's staff biologists recognize and

¹⁰ BPA Customer Group's Brief In Support of the Preliminary Injunction Appeal, Section VII.A.2, beginning on page 20.

support the utility of spill as a desirable means for providing safe fish passage, it would be wrong to generalize that position as support or a scientific justification for every conceivable proposal to spill water. The fish survival advantages of spill over transport are clearer under average and above average river flow conditions. In contrast, the advantages are uncertain when migrating fish are subjected to extreme low flow migratory conditions, as was anticipated for summer 2005. Furthermore, the benefits of spill are unique to the specific circumstances at each particular hydro-project. Washington supports continued research that is carefully targeted to better understand the risks and benefits of various means for the safe passage of salmon. Given the uncertainty in fish survival benefits associated with enhanced spills in extreme low flow years, the possibility of corresponding negative impacts to fish, and the economic upheaval that will result if the spill occurs, Washington believes that there is no immediate need to depart from the previously accepted strategy found in the 2004 Updated Proposed Action (the same strategy used in the 2000 BiOp and used in prior years when these conditions occurred).

Washington therefore urges this court not to accept the Appellees' inference that Washington State has adopted their reasoning on the benefits of spill under every circumstance. In the absence of more definitive science documenting the benefit of additional spill in a low flow year and evaluating any negative effects, Washington supports the federal government's proposed implementation of its pre-existing hydro strategy designed to address low-flow conditions.

IV. CONCLUSION

For the foregoing reasons, *amicus curiae* Washington State respectfully asserts that this court should sustain the district court's opinion that the 2004 BiOp was arbitrary and capricious if that issue is reviewed as a part of this appeal. However, this court should reverse the injunction.

RESPECTFULLY SUBMITTED this 30th day of June, 2005.

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A handwritten signature in black ink, appearing to read "Michael S. Grossmann", written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that on June 30, 2005 I served the *AMICUS BRIEF OF WASHINGTON STATE Amicus Curiae* supporting the Appellants on reversal of the district court's injunctive relief, but supporting Appellees on issues relating to the district court's determination that the federal government acted arbitrarily and capriciously regarding its duty to consult under the Endangered Species Act upon the parties hereto by the method indicated below, and addressed to the following:

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